

**Remarks General**

Applicant respectfully requests withdrawal of the finality of the Office Action, since it is noted to be improper.

**The Finality of the Office Action is Improper**

Examiner expects to impose unjustified rejections *without any factual evidence*.

Examiner has also introduced a new reference to Lane US 1,690,984) and hence the finality of the Office Action is improper.

It is of the record that examiner has at least:

- 1). Not made a prima facie case of a "non-elected invention" (burden of examiner ) i.e. has not articulated an alternative method to Applicant's method claims 403-416 as being patently distinct (see MPEP § 707.07(f)).
- 2). Not made a prima facie case of new matter for amendments to specification (burden of examiner) when Applicant had claimed "a composite material," as originally filed in claims 6, 19, 20, 21, 22, and 23, or enablement with regard to page 2: 35 USC 132(a) and 35 USC section 112, first paragraph, other than a generic MPEP paragraph stated rejection, which is not a sufficient or a valid *reason* (see 35 USC 132(a).
- 4). Not made a prima facie case of anticipation (burden of examiner ) over the known merits of Applicant's claims with regard to the reference to Musher (2,217,700) (1939). This includes, but is not limited to, "Reference V" sent by Examiner Jyoti Chwla to Applicant (Merriam Webster 3 pages, attached) where the PTO says a "composite material" is a "solid material" and the unit structure of Musher is anything but solid, (i.e. filled with interstices for ice cream) and,

As such, Applicant cannot properly respond to these allegations. Thus the finality of the Office Action is improper.(MPEP ' 706.07(a); MPEP 808.02. Accordingly, Applicant's amendments to the claims are therefore proper. Applicant is entitled to a means claim(s) section 112 (6) and method claims, below, unless proven otherwise by examiner. Examiner has not proven otherwise. Applicant therefore respectfully requests reconsideration and removal of the Final Office Action.

**Regarding Election/Restriction**

Claims 403-416 are said to be rejected as being independent or distinct from the invention elected in response filed January 18, 2003.

On page 3 of Advisory Action, continuation of 11, examiner states:

“Applicants’ argument that examiners’ withdrawal of method claims 403-416 for being directed to an invention other than elected invention is incorrect as method claims were not present at the time of the election and the election was made between the species of products (remarks 17-19) is not persuasive.”

In response, as far as Applicant is aware, the election of a species does not preclude an applicant from the right to a method(s) and/or a means claim(s). 35 USC Section 101; 35 USC Section 112(6) Examiner has the burden to prove that Applicant’s method claims are patentably distinct. Examiner *has not stated any reason* why Examiner has rejected the method claims as being patentably distinct. Examiner has not made a showing of distinctness between the method of making or using the product and the product, *as required*. Thus the restriction cannot be required. As below.

A rejection of the method claims solely for the reason of “election was made between the species of products” is not conclusive or valid.

Additionally, method claims need not be present at the time of any election, contrary to the merits of examiner’s argument. 821.04(b), as below. Furthermore, the record shows that Applicant had originally filed a method of making a support *prior to* any office action, restriction requirement, or election. See original method claim 28 filed August 18, 2000. (See 821.04(b) below.) Barring a *prima facie* case of patentable distinction from Examiner, all of Applicant’s claims are proper unless proven otherwise. MPEP § 806.05(i); MPEP § 806.05(f); MPEP § 806.05(h). Applicant therefore respectfully requests reconsideration and reinstatement of Applicant’s claims 403-416.

**821.04(b) Rejoinder of Process Requiring an Allowable Product [R-5]**

Where the application as originally filed discloses the product and the process for making and/or using the product, and only claims directed to the product are presented for examination, applicant may present claims directed to the process of making and/or using the allowable product by way of amendment pursuant to 37 CFR 1.121.

**806.05(i) Product, Process of Making, and Process of Using \*\* [R-3]**

37 CFR 1.141 Different inventions in one national application.

Where an application contains claims to a product, claims to a process specially adapted for (i.e., not patentably distinct from, as defined in MPEP § 806.05(f)) making the product, and claims to a process of using the product\*\*, applicant may be required to elect either (A) the product and process of making it; or (B) the process of using.

If the examiner cannot make a showing of distinctness between the process of using and the product ( MPEP § 806.05(h)), restriction cannot be required.

**808.02 Establishing Burden [R-5]**

Where, as disclosed in the application, the several inventions claimed are related, and such related inventions are not patentably distinct as claimed, restriction under 35 USC is never proper (MPEP section 806.05...)

**Regarding Amendments to Specification:**

The proposed amendments to the specification have been objected to under 35 USC 132(a) as said to introduce new matter into the disclosure. The added material which is said to not be supported by the original disclosure is as follows: the addition of “composite material” which is said to change the description from “a candy bar” to “a composite material candy bar” which is not the same as a generic term “candy bar” as originally described.

Applicant respectfully disagrees that the terminology “composite material” in the requested amendment is new matter. Examiner has presented no factual evidence for the rejection. The term “a composite material” is disclosed in original claims 6, 19-23, and, the material is disclosed in drawings 27A-27E, 29-31 and 13A, and throughout the specification as “composite support 62, 62A...” Furthermore, the terms “composite support” and “composite candy bar,” throughout the specification are all part of the original disclosure, *as originally filed*. The specification recites

“composite support,” and is enabled to one having ordinary skill in the art. As such, the specification may be amended to include the term “composite material.” Please see: **2163.06 Relationship of Written Description Requirement to New Matter:**

“...Stated another way, information contained in any one of the specification, *claims* or *drawings* of the application as filed may be added to any other part of the application without introducing new matter.”

Applicant’s specification also teaches “composite candy bar,” and copious examples of composite material candy bars including Milky Way, Snickers, Twix, Baby Ruth, Charleston Chew, Kit Kat, Butterfinger, and others. Applicant’s “composite material” is fully enabled to one with ordinary skill in the art. As such, Applicant’s requested amendment to the specification is proper.

Furthermore, the term “composite” relates to a “material,” not to an assembly of parts. (Musher) (Tuwien Applicant’s IDS) The use of the term “composite” to suggest an assembly of parts is a misnomer. Musher invention is not related to and does not anticipate Applicant’s claims.

Applicant therefore respectfully requests withdrawal of the objection and reconsideration and allowance of the amendments to the specification.

Applicant notes and appreciates the allowance to correct the typographical error regarding “caramel on top of the caramel” to “caramel on top of the cookie caramel.”

**Applicant’s Claims are Fully Enabled to One with Ordinary Skill  
in the Art Regarding 35 USC Section 112 First Paragraph**

The claims are said to be rejected under 35 USC Section 112 first paragraph, for the introduction

Appn. Number 09/641,410 (Kiely)

GAU 1794

Response to Office Action

19

of new matter by recitation of the term "composite material" in the claims which is said to change the description of "a candy bar" to a "composite material candy bar," which is not the same as a generic term "candy bar" as originally described.

As said many times previously, Applicant disagrees that the term, "a composite material" in the claims constitutes new matter. Examiner has not presented any evidence to support the rejection. The term "a composite material" was fully disclosed as originally filed on August 18, 2000 in claims 6, and in claims 19-23, amply disclosed in the specification, and in the drawings, as above. "Composite candy bar with caramel, whipped chocolate nougat which is dipped in chocolate" in the specification clearly denotes a composite material, and "composite stick 62" with diagonally running ingredient materials within the composite stick clearly denotes a composite material, and numerous examples of composite material candy bars, such as Milky Way, Twix, and Kudos are used in the specification, as originally filed. Examiner's rejection is improper.

In view of this documented evidence, Applicant therefore respectfully requests withdrawal of the rejection and reconsideration and allowance of all the claims.

Furthermore,

5/2/2002      The Office Action required a restriction among:

Species IVa, wherein the support is a candy bar

Species IVb, wherein the support is a cookie bar

Species IVc, wherein the support is a granola bar

The PTO had to have read and understood original claims 6, 19-23 in order to have made the restriction/election, directly above. Original claims 6, 19-23 August 18, 2000, recited:

6. The edible support of claim 1 wherein said support is a composite material, having a

plurality of ingredients, said edible support being suited for a plurality of configurations and orientations, **wherein said support is a candy bar, wherein said support is a cookie bar, wherein said support is a granola bar.**

**19. A supported comestible comprising:**

**(A) a body of edible substance, and**

**(B) an edible support suitable for supporting said body, wherein said support is a composite material, having a plurality of ingredients, said edible support having a.....”**

**21. The supported comestible of claim of 19 wherein said support is a candy bar.**

**22. The supported comestible of claim of 19 wherein said support is a cookie bar.**

**23. The supported comestible of claim 19, wherein said support is a granola bar.**

**12/19/2002 The Office Action required a restriction among:**

**Species I, wherein the comestible has a support as shown, e.g. in Fig. 1, or**

**Species II, wherein the comestible has a plurality of supports as shown e.g. in Fig. 35-39, and**

**Species III, wherein the support is a composite support as shown e.g. in Fig. 1, or**

**Species IV wherein the support is a homogenous support e.g. in Fig. 3**

Since the wording of the restriction requirement was taken directly from original claims 6, 19-23, which recited “a composite material,” Examiner cannot maintain that the term “a composite material” was not originally in the claims, is not enabled, or is new matter. Examiner cannot maintain the rejection as “new matter” when Examiner had acted upon it in 2002. It is noted that Examiner is self contradictory.

**Response to Note:** It is of record that the term “a composite material” is not new matter, is enabled, and has been acted upon to make a restriction by Examiner.

As above, the term “a composite material” in the claims is proper, enabled, and does not introduce new matter. Applicant therefore respectfully requests withdrawal of the objection and reconsideration and allowance of the claims.

### **Claim Rejections 35 USC Section 112, Second Paragraph**

Claims 383-402 are said to be rejected under 35 USC 112, second paragraph as being indefinite for the recitation of the terms :comprising a material comprising “two ingredient materials”, “single component,” “constituent ingredient materials.”

In response, the claims that included “ingredient material” “single component” “constituent ingredient materials,” have been amended and are clear to those having ordinary skill in the art of edible materials and confections.

The term “bite size” is said to be indefinite in the claims and one of ordinary skill in the art is said to not be reasonably appraised of the scope of the invention.

In response, Applicant disagrees and believes that the term “bite size” is well known to one of ordinary skill in the art. In addition, issued patents including 5,800,855 to Elias for Method of preparing aerated gum confection (1985) mention “bite size” without dimensions either in the claims or elsewhere in the specification. Grocery packages of cereal, such as generic brands, and name brands including “A&P” (tm) of granola, and cereal, and including Nabisco bite size Shredded Wheat cereal, all plainly recite “bite size.” A myriad of snack and candy packages, including the bite size “Nestle Bites,” (tm) whose exact image was repeatedly sent to Examiner,

Appn. Number 09/641,410 (Kiely)GAU 1794Response to Office Action22

are all prevalent in the art and in today's society. The term "bite size" is clear under 35 USC section 112, second paragraph, and is well known to one having ordinary skill in the art of edible materials.

The claims are said to be indefinite for the recitation of the term "mini."

In response, the term, "mini" has been omitted in view of the same coverage of the existing claim(s).

The claims are said to be indefinite for the recitation of "composite material," under section 112, second paragraph.

In response, as above, Applicant disagrees that Applicant's term "a composite material" is not definite. (See section 112, first paragraph, above) Examiner has not presented any factual evidence to the contrary, or a prima facie case to support the rejection. One having ordinary skill in the art of edible materials would not be confused by the term "a composite material," as originally filed in the claims, and described in detail throughout the specification, illustrations, and corresponding explanations of the drawings. Also, the term "composite material" is notoriously known throughout the world. (See patents issued by the PTO throughout the years that rely upon the term "composite material.")

**Examiner Has Not Established a Prima Facie Case of Anticipation Regarding  
Musher, Feybusch, nor any Cited Art Under 35 USC Section 102**

**N.B. Finality of the Next Action Is Precluded**

As above, although the Summary of the past Office Actions indicates that claims 383 - 402 stand rejected, the Detailed Actions omit any explanation of how any cited art anticipates these claims.



Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant. Consequently, a next Office Action rejecting claims 383 - 402 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP ' 706.07(a)).

Specifically, in the past Office Action, Applicant's claims 390, 394-402 "comprising a composite material" were said to be rejected by Examiner as being anticipated by Musher's unit structure, without any factual evidence in support thereof, as to the merits of Applicant's claims.

In response, Applicant conveyed that the unit structure of Musher was comprised largely of voids to hold ice cream, and did not at least show a "solid material." (See PTO's endorsed definition, below)

As a basis for reference, Examiner's "Ref. V 09/641,410," ( Attached) had been sent to Applicant from Jyoti Chawla and Keith Hendricks, i.e. endorsed by the PTO, from the Merriam-Webster's Collegiate Dictionary, Tenth Edition, page 236 which defined:

**Composite 4:** a solid material which is composed of two or more substances having different physical characteristics and in which each substance retains its identity while contributing desirable properties to the whole. [see attached]

After sending this definition, Examiner(s) continue to argue and continue to reject Applicant's claims on the basis that Musher has anticipated Applicant's claims. Examiner had sent Ref. V. "**Composite 4: a solid material**" to Applicant as the definition of the term, "composite," but also has also continually rejected Applicant's claims on the basis that: the unit support structure of Musher, (i.e. full of and requiring a myriad of voids) shows "a composite." It is noted that examiner(s) are self-contradictory.

Examiner had not addressed Applicant's response and omitted any explanation of how the cited reference to Musher anticipates Applicant's "composite material." This also amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant.

Examiner again has also not specified how the method claims are patently different than claims 383-402, as required, as above. This also amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant.

N.B. Additionally, the Examiner's citing the new reference of Lane et al. (US 1690984) also precludes the next Office Action from being final and from restricting amendments to claims.

Consequently, the Office Action rejecting the claims is improper and cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, *presuming that such an Office action sets forth a prima facie case.* (See MPEP ' 706.07(a)).

Hence, Applicant's amendments to the claims are therefore proper.

**Musher States by His Own Hand That He Uses Separate Materials  
In Every Part of His Support  
He Did Not Contemplate A Composite Material**

2131 Anticipation - Application of 35 U.S.C. 102(a), (b), and (e) [R-1]

"A claim is anticipated only *if each and every element* as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."

On 07/09/09 pg.13, Examiner stated:

"Regarding the argument that Musher's support is not non-frozen" the applicant is reminded that the baked support and the flakes and nuts etc., as taught by Musher make the composite support structure, which comprises voids where the ice-cream mixture is poured and frozen. Applicant is further referred to page 4 of Musher, where Musher teaches molding of stick and other flake material into a support structure for the frozen confection and forming the structure and coating it. The formed and coated support structure of Musher is non-frozen prior to addition of liquid and freezing steps. Thus the composite support for a frozen confection as taught by Musher is not-frozen until the ice cream material is poured into the voids and the entire structure is frozen."

Applicant's Independent claim 383 first recites: "A support for a frozen comestible..."

This limitation clearly distinguishes over Musher who does not show a non-frozen support. *All of Musher's embodiments as made and completed* in the drawings, specification, and claims show a frozen support. "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself..." MPEP 2113 Product-by-Process Claims. "...the end product, in both the prior art and the allowed process..."

Patentability is based on the product itself. Therefore, Examiner's rejection of Applicant's claims based on Musher's steps to make his unit structure is moot. Musher does NOT show a non-frozen support. Examiner has admitted that Musher uses many different materials to make his support structure.

Examiner further has admitted that the support is fully frozen at the completion of Musher's support: "...*Thus the composite support for a frozen confection as taught by Musher is not-frozen until the ice cream material is poured into the voids and the entire structure is frozen.*" (As above) Thus, Examiner agrees with Applicant that Musher has NOT anticipated Applicant's claims. I.e. "a claim is anticipated only *if each and every element* as set forth in the claim is

found,” 2131 Anticipation, as above. Therefore, for even this reason alone, Applicant’s non-frozen support legally passes the novelty requirement of section 102 over the reference to Musher. Examiner has not established a prima facie case of anticipation.

This limitation further clearly distinguishes over Musher. Musher’s invention requires a combination of a frozen support *and* a frozen comestible supported on the support. The fact that Musher’s invention is a *combined ice cream and support* in all embodiments and Applicant’s support does not require ice cream indicates that Applicant’s support is novel over that of Musher. For this additional reason, Applicant’s claims further satisfy the novelty requirement of section 102 over Musher.

Claim 383 then recites: “... comprising an edible material, said edible material comprises two materials.”

This limitation further clearly distinguishes over Musher, as Musher does not show a material that comprises two materials.

As related many times, Musher *teaches* of the different materials of a coating, flakes, wheat flakes, shredded wheat, and bran flakes. None of Musher’s materials comprise two materials.

Musher by his own hand teaches:

“Also as a further embodiment, larger flakes, such as potato chips may be used, or dry melba toast *or other dry baked materials* may be used. Pg. 1, col. 2, lls. 15-20

“*With reference to the binding or coating materials* of this invention...” Pg. 2, col. 1, lls. 33-43

“The flakes *or similar materials* which form the unit structure, after they have been mixed or coated, or otherwise combined with the binder material...” (pg. 3, col. 1, lls. 71-74). (i.e different materials)

“... This *fat-milk mixture* is then sprayed, or coated, or otherwise applied to the *flakes or structure pieces* and is allowed to congeal thereon.” (Pg. 3, col 1, lls. 36-39)

Examiner states that claims **383** and **394** are rejected since:

“Musher teaches ice cream (frozen comestible) on an non-frozen edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible confectionary materials or components that are combined together to make the support, i.e. two constituent ingredient materials....”

Examiner’s argument does not demonstrate that Musher has anticipated Applicant’s claims. Musher does not show a material that comprises two materials. Each of Musher’s materials show only raw ingredients.

By statute, a U.S. patent is presumed to be valid. What a reference teaches is based on fact. Musher factually dictates, by his own hand, that his “unit structure” is made of many *different* materials. (see above) It is not a prerogative of examiner to invalidate the existing facts of a designer’s invention, and maintain the rejection without any factual evidence. Giving a term the “broadest reasonable interpretation” does not entitle an examiner to ignore the facts given in a reference, or from responding to an Applicant’s claim as written, i.e. unlawfully eliminating limitations/terms from Applicant’s claims during examination to maintain rejections, such as elimination the term “material” from “composite material.” Applicant’s claims are clearly not anticipated. Musher clearly does not show a material that comprises two materials, or show a composite material.

Musher did not envision using A material comprising two materials in 1939. Applicant's material shows an overwhelming and markedly different material than that of any of the cited art. For this third reason, Applicant's novel support, having physically different structure, legally satisfies the novelty requirement of section 102 over Musher. Examiner has not established a prima facie case of anticipation.

### **Feybusch Did Not Envision A Composite Material**

#### **In 1926**

Claims 383-390, 392-402 are said to be rejected as being anticipated by Feybusch (US 1638480), as the *support* or cone taught by Feybusch *comprises* of *two* ingredient *materials*, i.e. cone making pastry material (such as sugar, flour etc) and edible adhesive material, such as, molasses, and popcorn or nuts or brittle or puffed rice. The ingredients sugar, water and flour etc., that are typical ingredient of the pastry cone as taught by Feybusch comprise an ingredient in the support as recited in claims 383-385 and 394-396.

Examiner's argument does not demonstrate that Feybusch has anticipated Applicant's claims. Examiner(s) are aware of the merits of Applicant's claims.

Applicant's Independent claim 383 recites: "A support for a frozen comestible comprising an edible material, said edible material comprises two materials."

This limitation clearly distinguishes over Feybusch who does not show an edible material that comprises two materials. Baked cone does not show two materials, since it shows only raw ingredients. Peanut brittle is a hard-crack boiled candy, which as cooled and completed, also does not show a material that comprises two materials. Molasses does not show two materials, only raw ingredients. Corn does not show two materials. The sugar, water and flour of Feybusch's cone do not show a bite size material comprising two

materials, since sugar, water and flour are raw ingredients. Therefore, Applicant's novel edible material that comprises two materials passes the novelty requirement of section 102 over Feybusch.

Independent claim 394 recites: "A support for a frozen comestible comprising an edible composite material."

This limitation clearly distinguishes over Musher, as Musher does not show a non-frozen support. Musher's support is frozen in all embodiments, as examiner concurs, as above. Applicant's non-frozen support is novel over the frozen support of Musher and therefore legally passes the novelty requirement of 35 U.S.C. section 102.

This limitation additionally clearly distinguishes over Musher, as Musher does not show a non-frozen edible composite material as all of his materials are frozen, which additionally satisfies the novelty requirement of section 102.

This limitation further clearly distinguishes over Musher, since Musher's invention requires a frozen support *and* a frozen comestible supported on the support in each and every embodiment of his invention. Applicant's support is novel over the combined support and ice cream of Musher's supported "Frozen Confection." Therefore, Applicant's support for a frozen comestible is physical hardware that is novel over that of Musher, as above. Therefore, Musher has not anticipated Applicant's support, which is novel, and additionally satisfies the novelty requirement of section 102.

This limitation further clearly distinguishes over Musher, as Musher's does not show a material that comprises two materials, as each of Musher's materials show only raw ingredients.

This limitation further clearly distinguishes over Musher, as Musher does not show an edible composite material. Musher does not show a material that comprises two materials and hence does not show a composite material, i.e. a material that comprises two or more materials. Applicant's support therefore has novel physical structure over Musher and legally satisfies the novelty requirement of section 102.

#### **707.07(g) Piecemeal Examination**

Piecemeal examination should be avoided as much as possible. The examiner ordinarily should reject each claim on all valid grounds available, avoiding, how-ever, undue multiplication of references. (See MPEP § 904.03.)

Examiner has cited references to Feybusch (US 1638480) eight years after filing on 4/30/08 and Lane et al. (1690984) nine years after filing on 7/9/09. Lane has been brought up for the first time during the time that examiner states is a "Final Office Action." Examiner is partaking in improper piecemeal examination for nine years contrary to MPEP 707.07(g) and improper office actions.

This limitation also clearly distinguishes over Feybusch, as none of his materials of usual pastry cone, molasses, hard crack peanut brittle, corn, and nut show a material that comprises two materials, as above. Therefore, Feybusch does not show a composite material, a material that comprises two or more materials.

Independent claim 403 is a means claim.

Independent 405 recites: "A method of making a support for a frozen comestible comprising comprising an edible material, said edible material comprises two materials."



This limitation clearly distinguishes over **Musher** who does not show a material that comprises two materials, a non-frozen support, or a “support only,” as above.

This limitation clearly distinguishes over **Feybusch**, since Feybusch does not show an edible material that comprises two materials.

Independent claim 412 recites: A method of making a support for a frozen comestible comprising comprising an edible composite material.

This limitation clearly distinguishes over **Musher** since Musher does not show a composite material, a material that comprises two or more materials, since each of his materials show only raw ingredients. This limitation also clearly distinguishes over Musher since Musher does not show a non-frozen material of any kind. Therefore, as above, he does not show an edible composite material.

This limitation also clearly distinguishes over **Feybusch**, as each of Feybusch’s materials show only raw ingredients, as above. Therefore, he does not show an edible composite material.

Therefore, Applicant’s claims are novel over the cited references of both Musher and Feybusch under 35 USC section 102. Applicant respectfully requests reconsideration and allowance of the claims under section 102.

### **Applicant’s Edible Support is Not Obvious Regarding Feybusch**

#### **In View of Lane Under Section 103**

Claim 391 is said to be rejected under 35 USC 103(a) as being unpatentable over Feybusch in

view of Lane et al. (US1690984). Examiner states: It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Feybusch based on the teachings from Lane and make the edible support comprising one material that has hollow confection length and another component that comprise a filling placed in said hollow length.

**The relied upon references:**

**Feybusch** teaches of a usual cone, item 10, a coating on the outside of a usual cone, item 11, which is then rolled in popcorn, or the like, item 12, as above.

**Lane** teaches of an inner cone, item 11, and an outer cone, item 12, and a filling, item 13, placed in between the two different cones.

Applicant's dependant claim 391 recites: The support for a frozen comestible of claim 383 wherein one of said two materials comprise an edible hollow confection length, wherein the other of said two materials comprise an edible filling placed in said hollow length, wherein said filling comprises a plurality of candy beads, colored sugar, flavored sugar, an edible confection rope, or a fluid ingredient, wherein said two materials comprise two materials placed concentrically.

This limitation clearly distinguishes over **Feybusch** as none of Feybusch's materials comprise two materials, as above.

This limitation clearly distinguishes over **Lane**, who's cone, whether it be the inner cone or the outer cone, does not show a material that comprises two materials. Baked cone shows only raw ingredients. Lane's filling also does not show a material that comprises two materials. Lane's filling, i.e. sweetened cream, icing, or the like, shows only raw ingredients.

The modification of Feybusch in view of Lane therefore does not show an edible material that comprises two materials, as none of the materials of either reference show a material that comprises two materials. Therefore, Applicant's claim 391 is not obvious with regard to the modification of Feybusch in view of Lane.

Applicant respectfully submits that the independent claims are all novel and unobvious. The dependent claims recite additional features and therefore Applicant respectfully submits that they are all a fortiori allowable.

Applicant therefore respectfully requests reconsideration and allowance of claims 384-417.

#### **Applicant's Novel Support Shows Unexpected Results**

Applicant's edible material provides unique and unexpected results. No prior art known to Applicant has made a support that comprises an edible material that comprises two materials. Additionally, no prior art known to Applicant has made a support that comprises a composite material. Among other things, Applicant's support comprises synergism. Applicant's support can be made with caramel, which has "give" to it and which can hold a fractured cookie together and still be used dependably to support a frozen confection. An example is a support comprising the ingredients of a Twix (tm) candy/cookie bar. The caramel layer of a Twix Bar can hold the cookie portion together if the cookie is broken during transit to still dependably support ice cream. Another example, such as a Milky Way, has give to it and is difficult to break. Applicant's support can be made faster than that of the cited art, is less expensive to make with regard to material, use of machinery and man hours. Applicant's two or more materials can be layered, mixed, swirled, twisted, placed concentrically, or in any direction, or any combination of directions needed to make a very strong support. The cited art structures cannot replicate this.

Applicant's material can be made in any thickness and in any shape, with or without voids, is

limitless in its configurations, variety of designs, flavors, and textures, and is not relegated to a preconceived structure, as is the prior art.

Applicant's material can also be a handle to hold, and a unique bite-size ingredient inside or outside the support, or inside or outside the supported comestible. Applicant includes a composite material for making either part of a support or the support itself. The prior art has never considered or included, or used a composite material in a support for a frozen comestible, as far as Applicant is aware. This is truly novel. The support may even assist to keep a supported frozen comestible colder while it is being eaten from the inside out far longer than a cited art baked stick. The incorporation of synergism to resist stress against breakage into a support for a comestible is also truly unique, unanticipated, and novel, with unexpected and advantageous and dependable results.

**Response to Examiner's Arguments:**

Applicant does not agree with Examiner's Arguments or comments on pages 11-14 of the Office Action.

Examiner has continued to change Applicants words, eliminate a limitation(s) from Applicant's claims and ignore the merits of Applicant's claims during examination, even though the merits are well known (response to restriction) to maintain rejection and therefore Examiner arguments are improper and moot.

4. **Section 707.07(f)** of the Manual of Patent Examining Procedure (MPEP) instructs that:

Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it.

Examiner has repeatedly held the claims rejected without factual evidence. Examiner has neither "taken note" of Applicants' argument nor "answered the substance" of Applicants' argument.

Thus, the final Office Action is also deficient because the Office failed to satisfy the requirements of MPEP § 707.07(f).

NOV 23 2009

Appn. Number 09/641,410 (Kiely)GAU 1794Response to Office Action35**Conclusion**

For all of the above reasons, Applicant submits that the claims define novel structure under §102, which novel structure is unobvious and thus patentable under §103. Accordingly Applicant respectfully requests withdrawal of all rejection and reconsideration and allowance of all the claims.

**Conditional Request For Constructive Assistance**

Applicant submits that she has a novel and unobvious invention. She has made a diligent effort to amend the claims of this application so that they recite novel features of her invention, which she submits are unobvious. If, for any reason, the Examiner believes that the claims of this application are not yet in full condition for allowance, Applicant respectfully requests the Examiner's constructive assistance and suggestions pursuant to the spirit of MPEP §706.03(d) and §707.07(j). This will enable the undersigned to place this application in fully allowable condition as soon as possible and without the need for further proceedings.

Very Respectfully,



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NOV 23 2009

Appn. Number 09/641,410 (Kiely) GAU 1794 Response to Office Action 36

Attached:

Merriam-Webster Collegiate Dictionary, tenth addition, copy of examiner's definition of "composite material" sent to Applicant. 3 pages.

**Certificate of Facsimile:** I certify that on the date below, this document and referenced attachments, if any, will be faxed to the central fax number of 571-273-8300 to the United States Patent and Trademark Office "Commissioner for Patents" Arlington, Virginia 22313.

2009 November 22,

  
Alice O. Kiely

Ref. V. 09/64/416



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Library of Congress Cataloging in Publication Data  
Main entry under title:

Merriam-Webster's collegiate dictionary. — 10th ed.  
p. cm.

Includes index.

ISBN 0-87779-708-0 (unindexed : alk. paper). — ISBN 0-87779-709-9 (indexed :  
alk. paper). — ISBN 0-87779-710-2 (deluxe : alk. paper). — ISBN 0-87779-707-2  
(laminated cover).

1. English language—Dictionaries. I. Merriam-Webster, Inc.

PE1628.M36 1997  
423—dc20

96-42529  
CIP

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09/641, 410 JOK



